(1)

Supreme Court, U.S.
FILED

Docket No. 971593 MAR 23 1998

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1997

PARSHOTAM SINGH CHAHIL, Ph. D.
Petitioner

v.

DAN GLICKMAN
Secretary of Agriculture
Respondent

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Daniel M. Press
Counsel of Record for Petitioner
Philip K. Chung
Russell B. Adams, III
CHUNG & PRESS, P.C.
6723 Whittier Ave., Suite 302
McLean, VA 22101
(703) 734-3800

60 pp

QUESTIONS PRESENTED

1. To constitute adverse employment actions actionable under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973, as amended, must each instance of disparate treatment of a federal employee based on membership in a protected class reach a threshold level of seriousness even when it forms part of a pattern of discriminatory mistreatment?

2. Does a pattern of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, in which some of a series of related acts of discrimination occurred outside the limitation period for administrative complaints but with continuing effects within the time period covered by timely complaints, constitute a continuing violation, thereby rendering the whole course of conduct actionable?

3. Does giving a disabled employee no work to do yet rating him fully satisfactory, admittedly because of his disability, constitute direct evidence of discrimination actionable under the Rehabilitation Act when it affects the employee's chances for promotion and advancement?

4. Does accommodation of one aspect of a blind federal employee's disability by providing assisted reading equipment satisfy the agency's duty under the Rehabilitation Act to provide reasonable accommodation when it fails to accommodate other aspects of the disability by requiring the blind employee to navigate a stairway to use a printer and by failing to provide a working environment free of smoke and glare?

PARTIES

The parties in the Courts below were Petitioner Parshotam Singh Chahil and the Secretary of Agriculture, currently Respondent Dan Glickman.

There being no corporate parties, a list of parents and subsidiaries is not required.

TABLE OF CONTENTS

Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	vi
Citations to Opinions and Orders Entered in the Case	1
Statement of Jurisdiction	1
Statutes Involved	1
STATEMENT OF THE CASE	2
Basis for Federal Jurisdiction in the Courts Below	2
Factual Background	2
ARGUMENT	13
I. There is no minimum threshold necessary for an act of discriminatory treatment to constitute an adverse employment action under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973, as amended, particularly when it forms part of a pattern of discriminatory mistreatment.	13
II. Where there is a pattern of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, in which some of a series of related acts of discrimination occurred outside the limitation period for administrative complaints but with continuing effects within the time period covered	18

by timely complaints, it constitutes a continuing violation, thereby rendering the whole course of conduct actionable.

III. Giving an employee with a disability no work to do yet rating him fully satisfactory, admittedly because of his disability, constitutes direct evidence of discrimination actionable under the Rehabilitation Act. 21

IV. The decision below, in holding that accommodation of only one aspect of Dr. Chahil's disability by providing assisted reading equipment satisfies the agency's duty under the Rehabilitation Act to provide reasonable accommodation, despite failing to accommodate other aspects of the disability by requiring him to navigate a stairway to use printers on another floor and by failing to provide a working environment free of smoke and glare, creates a conflict among the circuits on an important issue and decides an important federal question that should be settled by this court. 25

CONCLUSION 28

APPENDIX A1

Opinion of the U.S. Court of Appeals for the Fourth Circuit, October 7, 1997. A1

Memorandum Opinion of the U.S. District Court for the District of Maryland, October 15, 1996 A5

Order Granting Summary Judgment, October 15, 1996 A14

Order of U.S. Court of Appeals for the Fourth Circuit Denying Petition for Rehearing A15

STATUTORY AND REGULATORY PROVISIONS A16

29 U.S.C. § 791 A16

29 U.S.C. § 794a A17

42 U.S.C. § 1981a A 17

42 U.S.C. § 2000e-2 A19

42 U.S.C. § 2000e-3 A20

42 U.S.C. § 2000e-16 A20

29 C.F.R. § 1630.4 A22

29 C.F.R. § 1630.5 A22

29 C.F.R. § 1630.9 A23

TABLE OF AUTHORITIES

Cases	Page
Bazemore v. Friday, 478 U.S. 385 (1986)	19
Bishop v. Wood, 426 U.S. 341 (1976)	3
Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994)	19
Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988)	26-27
Collins v State of Illinois, 830 F.2d 692 (7th Cir. 1987)	15
Glass v. Petro-Tex Chemical Corp., 757 F.2d 1554 (5th Cir. 1985)	19
Green v. Los Angeles Cty. Superintdt. of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989)	20
Harris v. Forklift Systems, Inc. 510 U.S. 17 (1993)	13-18
Hayes v. Shalala, 902 F. Supp. 259 (D.D.C. 1995)	16-17
Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980)	19
Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993), cert. denied 513 U.S. 806 (1994)	25-26
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	21,24
Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)	13-18
Nealon v. Stone, 958 F.2d 584 (4th Cir. 1986)	19
Page v. Bolger, 645 F.2d 227 (4th Cir. 1981)	13-18
Palmer v. Shultz, 815 F.2d 84 (D.C. Cir.1987)	16
Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)	15

Shepard v. Adams, 670 F. Supp. 22 (D.D.C. 1987) 19

Sosa v. Hiraoka, 920 F.2d 1451 (9th Cir. 1990) 19-21

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 26

Taylor v. FDIC, 132 F.3d 753 (D.C. Cir. 1997) 17

Taylor v. Home Ins. Co., 777 F.2d 849 (4th Cir. 1985) 19

Timus v. Secretary of Labor, 782 F. Supp 122 (D.D.C. 1991) 16

Trans-World Airlines v. Thurston, 469 U.S. 111 (1984) 21

Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990) 22-24

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir.), cert. denied, 459 U.S. 971 (1982) 20

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

29 U.S.C. § 791 *passim*

29 U.S.C. § 794a 2

42 U.S.C. § 1981a 3, 17-18

42 U.S.C. § 2000d *et seq.* *Passim*

42 U.S.C. § 2000e-2 14, 24

42 U.S.C. § 2000e-5 2

42 U.S.C. § 2000e-16 2

Regulations

29 C.F.R. § 1614.105 20

29 C.F.R. § 1630.4 15

CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the U.S. Court of Appeals for the Fourth Circuit which is sought to be reviewed herein was unreported. It is on the Lexis database at *Chahil v. Secretary of Agriculture*, 1997 U.S. App. LEXIS 27296. It is reported in table format at 125 F.3d 847 (1997).

The opinion of the U.S. District Court for the District of Maryland in *Chahil v. Secretary of Agriculture*, No. CA-94-3201-CCB, is unpublished.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed in this Court is the Opinion of the United States Court of Appeals for the Fourth Circuit, issued on October 7, 1997. An Order denying Petitioner's timely Petition for Rehearing and Suggestion for Rehearing in Banc was entered on December 22, 1997. This Petition is filed within 90 days of the order denying rehearing.

Jurisdiction to review on certiorari the judgment in question is conferred on this Court by 28 U.S.C. § 1254

STATUTES INVOLVED

The following statutes and regulations involved in this case are set forth verbatim in the Appendix:

Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a.

Civil Rights Act of 1991, 42 U.S.C. § 1981a

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, -3, and -16,

Regulations promulgated under the Rehabilitation Act, 29 C.F.R. §§ 1630.4, .5, and .9

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the Courts Below

This action was brought in the U.S. District Court for the District of Maryland under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 791, against the United States Secretary of Agriculture. Subject matter jurisdiction in the District Court was proper under 42 U.S.C. §§ 2000e-5(f)(3) and -16(c), 29 U.S.C. § 794a, and 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Court of Appeals on appeal from the final judgment therein was conferred by 28 U.S.C. § 1291.

Factual Background

This Action, alleging discrimination in federal employment, was filed on November 17, 1994, in the U.S. District Court for the District of Maryland. After discovery, the Defendant Secretary of Agriculture moved for summary

judgment, and on October 15, 1996 (entered on the docket on October 17), the District Court (Blake, J.) entered an Opinion and Order granting the Defendant's Motion as to all counts. That judgment was summarily affirmed by the U.S. Court of Appeals for the Fourth Circuit, and a Petition for Rehearing and Suggestion for Rehearing in Banc was denied.

In granting summary judgment for respondents, the District Court was required to resolve all genuine disputes as to material facts in favor of Dr. Chahil. As a result of the case having been disposed of by motion for summary judgment, in its appraisal of petitioner's claim, this Court must accept his version of the facts. Bishop v. Wood, 426 U.S. 341, 347 and n.11 (1976).

This case stems from the defendant's continuing pattern of discrimination against Parshotam Singh Chahil, Ph. D., from 1985 to 1994, while he was employed with the Human Nutrition Information Service ("HNIS"), an agency of the U.S. Department of Agriculture ("USDA"). In April, 1984, Dr. Chahil accepted a position as a mathematical statistician with HNIS in Hyattsville, Maryland. JA 10[1]. Dr. Chahil applied for this advertised position and was hired by Dr. Brucy Gray on the basis of a telephone interview. JA 44. Dr. Chahil was employed as a GS-11 (Step 1) on a GS-11/13 career ladder. JA 10. Dr. Chahil to this day, nearly 14 years later, is still employed as a GS-11. Id.

---

[1]JA cites refer to the Joint Appendix filed by the parties in the Court of Appeals.

Dr. Chahil was born on November 1, 1937, in Ghaarangna, Punjab, India. JA 9. Dr. Chahil is a devout Sikh and he actively observes all aspects of that religion. JA 9. Dr. Chahil was the only Sikh employed at HNIS during his tenure with that agency. JA 711. As a part of his religion Dr. Chahil wears a turban and maintains a full beard, which presents a very distinct appearance. JA 9.

In January, 1985, shortly after his arrival at HNIS, Dr. Chahil developed a severe cornea problem which has required numerous surgeries in both eyes, including corneal transplants. JA 10. Additionally, Dr. Chahil developed glaucoma which also required extensive treatment. JA 53, 54. Despite the treatments, Dr. Chahil is legally blind. JA 10. He cannot read standard-sized printed material without the assistance of a magnifying device or equipment. JA 1263.

Dr. Chahil's supervisors repeatedly and continuously ignored Dr. Chahil's needs and rights as a disabled employee. Rather than take affirmative steps to determine the extent to which his needs could be accommodated, Dr. Chahil's supervisors often ignored or inexcusably denied his requests for accommodation.

In April, 1985, upon Dr. Chahil's return to work after his first eye surgery, his ability to perform his job duties largely depended on the assistance his supervisor, Brucy Gray, would provide. JA 1253. During this time Dr. Chahil approached Mr. Gray and made it clearly known that because of his disability he was unable to use the computer equipment because he could not see the screen. JA 1264. As such, Dr. Chahil made repeated

requests to Mr. Gray for assistance, including a reader. JA 1264, 1539, 1540, 1543, 1546.

Mr. Gray did not provide any accommodation to Dr. Chahil. Mr. Gray simply ignored Dr. Chahil's requests for accommodations. Mr. Gray then intentionally intimidated Dr. Chahil by stating that if Dr. Chahil "could not see the screen, he then could not do his work, and then he should take the next step" -- clearly implying that Dr. Chahil should quit. JA 1264, 1543.

Mr. Gray openly admits that he and his branch were responsible for the acquisition of automatic data processing ("ADP") equipment, including equipment that could have accommodated Dr. Chahil. JA 1251, 1253. Mr. Gray testified under oath that he undertook great efforts to determine the availability of special high-tech equipment for low vision disabled employees. JA 1250-1253. Such efforts included attending high-tech conferences and seminars to observe demonstrations of such equipment. JA 1251-1252. Mr. Gray even testified that he became more sensitive to the need for such equipment in light of Dr. Chahil's disability. JA 1251, 1254, 1255. Yet when questioned as to why Dr. Chahil never received such accommodations, Mr. Gray simply responded "I don't recall." JA 1256, 1257.

In or about April, 1988, Dr. Peter Basiotis became Dr. Chahil's supervisor. JA 1172, 1266. At that time, Dr. Chahil renewed his request for some sort of specialized computer equipment which could accommodate his low vision disability. JA 1265. Unlike Mr. Gray, Dr. Basiotis did agree to the

acquisition of the equipment, a decision approved by his supervisor Dr. Rizek. JA 1180, 1181. However, after HNIS provided such approval, Dr. Chahil received no further assistance from Dr. Basiotis or HNIS with regard to the selection and procurement of the equipment. JA 1266, 1556.

What ensued was a slow, time-consuming, and frustrating process, which took over two years before Dr. Chahil had the actual use of such equipment. JA 1265, 1266, 1555-1577. Dr. Chahil did eventually receive the equipment, and after some time working out the kinks with the system Dr. Chahil eventually had a working system by the Fall of 1990. JA 1571.

HNIS further discriminated against Dr. Chahil by failing to provide him with the same word processing capabilities provided to all other HNIS personnel. During Dr. Chahil's tenure at HNIS, HNIS undertook two agency-wide upgrades of its ADP capabilities. JA 1215-1221. With each upgrade, HNIS blatantly excluded Dr. Chahil from participating and benefiting in the upgrades. Id.

By the end of 1992, Dr. Chahil's low vision disability had become well documented with HNIS, especially with regard to Dr. Chahil's need for a special office environment. JA 1464-1466 Dr. Chahil's eyes were very susceptible to infection, JA 1465-1466, and HNIS did accommodate Dr. Chahil in providing him with an office with adequate ventilation. JA 16.

Despite his need for this special office environment, on or about January 27, 1993, Mr. David Rust, Dr. Chahil's second line supervisor, notified Dr. Chahil that he intended to remove

him from his office accommodation and place him in a secretarial bay area. JA 1239. The cramped secretarial bay area offered no ventilation. JA 1137, 1143-1146. Dr. Chahil could not control the glare from the lights in this bay area, and he did not have sufficient space to set up his equipment. JA 1135-1136.

Mr. Rust moved Dr. Chahil into the secretarial bay, ignoring the abundance of information and documentation supporting Dr. Chahil's need for office accommodations. JA 1237, 1464-1466. This decision exposed Dr. Chahil to a smoke filled environment, with no ability to control the glare of the light, creating a situation detrimental to Dr. Chahil's health. The situation was corrected only after Dr. Chahil was forced to complain of the defendant's actions. JA 1138.

The defendant further disregarded Dr. Chahil's needs by depriving him of printing facilities while he was located on the fourth floor of HNIS's offices. JA 214-215. Defendant's delay in immediately correcting the situation exemplifies the defendant's disregard of Dr. Chahil's right to reasonable accommodations. It is indisputable that Dr. Chahil immediately notified his first- and second-line supervisor when he was barred from using the fourth floor printer which was located in his office suite. JA 1395-1399. Instead of looking into the matter, Dr. Chahil's supervisors simply did nothing, forcing Dr. Chahil, a blind man, to traverse the stairs between the third and fourth floors whenever he needed a document printed. JA 1267.

Beginning in 1985, soon after Dr. Chahil had become stricken with his low-vision disability, the terms and conditions

of his employment became dramatically down-graded, effectively placing Dr. Chahil in the HNIS "dog-house". The record establishes that Dr. Chahil was isolated from the mainstream of HNIS' regular activities, and he was denied the opportunity to assume responsibilities and obligations needed to advance his career as a mathematical statistician.

While Dr. Chahil's career stagnated at HNIS, similarly situated HNIS employees, outside of his Title VII and Rehabilitation Act protected classes, did not suffer the same fate, but instead flourished under the same HNIS first and second line supervisors. Such similarly situated employees received regular promotions, were assigned far more significant assignments, undertook supervisory responsibilities, and participated on professional agency and inter-agency committees and work groups.

In 1986 Dr. Chahil filed an administrative complaint against Brucy Gray asserting that Mr. Gray had wrongfully failed to provide a within-grade pay increase. JA 1264. Subsequently, Brucy Gray simply did not provide any assignments to Dr. Chahil, essentially beginning Dr. Chahil's tenure in the HNIS dog house. JA 1542, 1550, 1551. Dr. Chahil's 1986-1987 Year End Accomplishments Report clearly demonstrates that Mr. Gray did not provide Dr. Chahil with any assignments, a matter with which Dr. Chahil openly confronted Mr. Gray. JA 1317. Despite this failure to provide work, Mr. Gray arbitrarily appraised Dr. Chahil's 1986-87 performance as "meets fully successful", a rating that Dr. Chahil did not want if he could not earn it properly. JA 1553, 1554.

Mr. Gray also readily admits that he gave Dr. Chahil arbitrary evaluations which were not supported by Dr. Chahil's performance. JA 1259, 1260. Mr. Gray's sole explanation for this comes down to the simple assertion that he was charitable to Dr. Chahil, and that otherwise Dr. Chahil would have lost his job. JA 1260. But without productive work, coupled with productive criticisms, Dr. Chahil became unable to get promoted.

In April, 1988, the defendant removed Dr. Chahil from the Survey Statistics Branch -- the HNIS Branch with the statisticians -- placing him under the supervision of Dr. Peter Basiotis. JA 1172, 1266. While Dr. Chahil readily admits that Dr. Basiotis never exhibited any hostility towards him and that he always treated him in a professional manner, it is inescapable that the defendant assigned Dr. Basiotis as the plaintiff's supervisor for no other reason than to baby-sit the plaintiff.

The fact that Dr. Basiotis was baby-sitting Dr. Chahil is exemplified by the fact that the first two years of Dr. Basiotis' supervision simply involved observing Dr. Chahil's attempt to acquire his low vision computer equipment. JA 141. The defendant made no demands of Dr. Chahil during this period, and it simply allowed Dr. Chahil to toil away on the acquisition of the equipment. JA 125-146.

Dr. Chahil was not given any other assignment other than a long term project. JA 1265, 1266. As such, Dr. Chahil did not have the opportunity to interact on a daily basis with the other HNIS statisticians and personnel. JA 1266 Dr. Chahil's deprivation of any meaningful professional interaction with the

other HNIS statisticians lasted for four years. JA 1265-1266. During this four year period neither Dr. Basiotis, nor any other HNIS supervisor provided any criticism of Dr. Chahil's work. Id.

For the period from 1985 through approximately November, 1992, the careers of those HNIS employees "similarly situated" to Dr. Chahil flourished. HNIS had three mathematical statisticians similarly situated to Dr. Chahil. They were Joseph Goldman, Renee Powell, and Alvin Nowverl. The periods of employment with HNIS for each of Goldman, Powell and Nowverl overlapped with Dr. Chahil's employment with HNIS. It is indisputable that the careers of Goldman, Powell and Nowverl advanced, while Dr. Chahil's career simply floundered.

Mr. Goldman is a white male who does not have any disability. The defendant hired Mr. Goldman in 1987 as a mathematical statistician at the GS-7 grade level. JA 1213. Subsequently, while Dr. Chahil remained a GS-11, Mr. Goldman was promoted to a GS-9 in 1988, to a GS-11 in 1990, and to a GS-12 in mid-1991 when he received a position with the Nutrition Monitoring Division of HNIS. Mr. Goldman was promoted to a GS-13 in early 1995. JA 1206.

Ms. Powell is a black female who does not have any disability. Ms. Powell began her employment with the defendant in 1978 as a mathematical statistician at the GS-5 grade level. JA 1199. Ms. Powell regularly received promotions such that in 1979 she was promoted to a GS-7, in 1980 or 1981 she was promoted to a GS-9, in 1983 she was promoted to a GS-11, and

to a GS-12 in 1989. JA 1199-1200.

Mr. Nowverl is a black male who does not have any disability. Mr. Nowverl began his employment with the defendant in June, 1980 as a statistician at the GS-5 grade level. JA 1224. Mr. Nowverl regularly received promotions. In September, 1981, Mr. Nowverl was promoted to a GS-7. In September, 1982, he then received a promotion to a GS-9, and then to a GS-11 in 1985. JA 1224. In January, 1990, Mr. Nowverl was promoted to a GS-12. JA 1224.

Goldman, Powell and Nowverl each received far more significant assignments and opportunities from the defendant. Such assignments and opportunities included the following: (1) advising and assisting HNIS personnel in statistical matters, data and computer usage and use of specialized software packages; (2) providing technical information to non-agency personnel concerning HNIS surveys and assisting in development and application of new technology; (3) various statistical work with regard to the Nationwide Food Consumption Surveys ("NFCS") and the Continuing Surveys for Individual Intake ("CSFII"); and (4) the supervision of student assistants. JA 1405, 1406, 1407, 1420-1422.

Dr. Chahil's career stagnated despite the fact that he was the most highly credentialed statistician. Dr. Chahil's formal education concluded in 1973 when he received a Ph. D. in Statistics and Quantitative Genetics from Louisiana State University. JA 1522. In his doctoral studies at Louisiana State University, Dr. Chahil pursued extensive studies in the field of statistics which eventually culminated in the acceptance and

publication of his doctoral dissertation. JA 1522.

After receiving his Ph.D. in 1973, Dr. Chahil was employed in various academic and governmental positions, in which each position utilized, and added to, his experience as a statistician. JA 1523-1536. In October, 1980, Dr. Chahil began his first position with the USDA in the Food and Nutrition Service Agency ("FNS") in the Midwest Regional Office in Chicago, Illinois. JA 10. Dr. Chahil was initially employed as a mathematical statistician at a GS-9 grade, however within a few months he was quickly promoted to the GS-11 position as a regional statistician. JA 10. Dr. Chahil was employed at the Midwest Regional Office through most of 1984, and during this time he received annual performance appraisals which regularly rated his work as "meets fully successful". JA 1306, 1537. Thus by the time Dr. Chahil joined HNIS in 1984 he had approximately eleven years of practical experience, four of which were with the USDA, coupled with his Ph.D. in statistics.

At all times relevant to this action Dr. Chahil was a qualified statistician. In addition to the fact that Dr. Chahil was the most credentialed statistician at HNIS, defendant cannot dispute the assessments by supervisors who actually had the technical capability to make an informed opinion of Dr. Chahil's work. The record overflows with assessments from Dr. Basiotis positively commenting on Dr. Chahil's ability as a statistician. JA 1175, 1176, 1177, 1179, 1183, 1184, 1318-1329, 1400. Furthermore, both Renee Powell and Joseph Goldman, Dr. Chahil's peers and fellow statisticians, uniformly characterized Dr. Chahil's work as a good work product. JA 1198, 1207.

ARGUMENT

I. There is no minimum threshold necessary for an act of discriminatory treatment to constitute an adverse employment action under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973, as amended, particularly when it forms part of a pattern of discriminatory mistreatment.

The Fourth Circuit's decision in Page v. Bolger, 645 F.2d 227 (4th Cir. 1981), the principal case relied upon by the court's below to dismiss Appellant's claims, is not still valid in light of the Civil Rights Act of 1991's expansion of remedies under Title VII, the Supreme Court's decisions in Harris v. Forklift Systems, Inc. 510 U.S. 17 (1993) and Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) and decisions of other Courts of Appeals.

Without explaining which "negative experiences" it considered to be or not to be adverse employment actions, District Court Opinion at n.3 (Appendix at A10), the district court excluded several incidents of the pattern and practice of discriminatory treatment of Appellant by reference to Page. The Fourth Circuit did not expand on the district court's reasoning. The reliance of both upon Page is misplaced. It is unsupported by the current statutory language (particularly that added by the Civil Rights Act of 1991), more current case law, and by the

language of Page itself.[2]

Title VII, as codified at 42 U.S.C. § 2000e-2(a), makes it an unlawful employment practice for an employer:

> (1)... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The phrase "other terms, conditions, or privileges of employment" is intended to include, *inter alia*, "[j]ob assignments,... lines of progression, ... [s]election... for training,

---

[2]Even under Page, actions remediable under the anti-discrimination laws certainly include decisions such as hiring, granting leave to, discharging, promoting, and compensating the employee -- the latter two clearly well pled within the scope of Dr. Chahil's formal complaints. However, personnel actions covered by Title VII are by no means limited to just these actions. Page recognized that "there are certainly other [decisions] than those we have specifically identified that may be... considered [as ultimate employment actions]-- for example, entry into training programs." Id. at 233. Page simply held that "interlocutory or mediate" decisions that did not directly affect the Plaintiff and which were not remediable under Title VII at that time, such as the composition of an evaluation panel in Page itself, do not rise to Title VII violations. Id. at 233.

including... professional meetings, conferences, and other related activities." See 29 C.F.R. § 1630.4. Dr. Chahil was denied the opportunity to attend professional meetings and conferences; he was moved out of the line of progression in his career track, relegated to the "dog house" given make-work tasks or no job assignments and, as a result, denied promotions when everyone around him was promoted from grades lower than his to grades above his. Other courts of appeals have held that this constitutes adverse employment action. See, e.g. Collins v State of Illinois, 830 F.2d 692, 703 (7th Cir. 1987) (adverse job action not limited to pay or benefits, and includes moving an employee's office to an undesirable location and transferring an employee to an isolated corner of the workplace).

Today, as opposed to the time of Page, Title VII's prohibition against discrimination with respect to terms, conditions, or privileges of employment "is not limited to 'economic' or 'tangible' discrimination." Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (harassment of female employee need not seriously affect psychological well-being or lead to injury to be actionable as "abusive work environment") (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). Indeed, it is intended "'to strike at the entire spectrum of disparate treatment' which includes requiring people to work in a discriminatorily hostile or abusive environment.") Id. at 370, (quoting Meritor at 64). See also Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (charge of segregating employer's patients stated claim of unlawful discrimination in terms and conditions of employee's employment). Only by looking at all of the circumstances of a particular case, such as the frequency of the discriminatory conduct and whether it unreasonably

interferes with work performance, can it be determined whether an environment is hostile or abusive. Harris at 371.

Title VII's application to the terms and conditions of employment in a manner analogous to this case is exemplified by the decision in Timus v. Secretary of Labor, 782 F. Supp 122, 124 (D.D.C. 1991). In Timus, the plaintiff, a federal employee, filed a Title VII action alleging that the quality of her duties were down-graded after her return from maternity leave. She established a sex discrimination claim based on pregnancy by showing that, when she returned from maternity leave, she was not given the same responsibilities that she had performed before her leave.

In Hayes v. Shalala, 902 F. Supp. 259, 266 (D.D.C. 1995), that court noted that while that circuit had not directly addressed the holding in Page, "where it has spoken, it has adopted a broader interpretation of actionable 'personnel actions' than that of the Fourth Circuit." (Citing Palmer v. Shultz, 815 F.2d 84 (D.C. Cir.1987)). That court concluded that the plaintiff-employee "must be permitted to argue that the totality of actions taken by his employer collectively created a harassing and retaliatory environments, even if individual actions may not have left a permanent paper trail or may even have been 'mediate' employment decisions as identified by this court in Page.

To the extent Page v. Bolger holds that actions such as those taken against Appellant, particularly when viewed as a pattern, are not actionable, Appellant submits that Page has been impliedly overruled by two subsequent events. It was not until

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), and Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), after Page was decided, that the concepts of a hostile or abusive work environment and of harassment not rising to the level of a constructive discharge were recognized as unlawful discrimination by this Court. To the extent Page excludes from Title VII protection more than "interlocutory or mediate decisions," it relies on the outdated concepts of employment discrimination rejected in Meritor and Harris, and is overruled by them. See Hayes v. Shalala, 902 F. Supp. 259, 266-67 (D.D.C. 1995) (recognizing inconsistency between Page and Meritor).[3]

Moreover, Page was decided under an older version of Title VII in which the remedies available for employment discrimination were limited to injunctive relief and back pay. No damages were recoverable, so for discrete acts not amenable to injunctive relief, and not directly affecting earnings, Title VII could easily be seen not to afford a remedy. This changed with the enactment of the Civil Rights Act of 1991, 105 Stat. 1071, Pub. L. No. 102-166 (Nov. 21, 1991), in which Title VII plaintiffs (including Federal employees) were given the right to trial by jury and to compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses". 42 U.S.C. § 1981a. This landmark legislation changed the landscape of Title VII and created a remedy for injuries that were previously not actionable. The district court and the Court

---

[3]In Taylor v. FDIC, 132 F.3d 753 (D.C. Cir. 1997), the D.C. Circuit stated that it was not deciding the issue presented by Page.

of Appeals did not consider or even address these issues, even though they were raised before them. This Court should hold that Page, decided ten years prior to the 1991 Act, merely recognized the lack of an effective remedy at that time but was subsequently overruled by the 1991 Act.

Because both Page and the lower courts' opinions in this case are inconsistent with this Court's decisions in Harris and Vinson, and with the Civil Rights Act of 1991, this Court should grant *certiorari* to consider these important issues.

II. **Where there is a pattern of discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, in which some of a series of related acts of discrimination occurred outside the limitation period for administrative complaints but with continuing effects within the time period covered by timely complaints, it constitutes a continuing violation, thereby rendering the whole course of conduct actionable.**

The District Court and Court of Appeals refused to consider Dr. Chahil's evidence of discriminatory treatment occurring prior to his first EEO administrative complaint in 1992. During the period up to and following the time when D. Chahil filed his first complaint, he was unlawfully subjected to a continuing pattern of discriminatory incidents and practices in a continuing violation of his rights under Title VII and the Rehabilitation Act. This rendered actionable all such conduct despite the lack of prior administrative complaints.

This Court and the Courts of Appeals have embraced the concept of "continuing violation". The district court and the Fourth Circuit overlooked this extensive body of law.

The continuing violation doctrine has been widely accepted. In Bazemore v. Friday, 478 U.S. 385 (1986), this Court held that continuing effects of pre-Title VII wage differentials were actionable under Title VII. In Nealon v. Stone, 958 F.2d 584 (4th Cir. 1986), the Fourth Circuit itself held, in an Equal Pay Act case, that if there are effects of discrimination which occurred before the limitation period that continue into the time period covered by timely complaints, the continuing discrimination is actionable. See also Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994); Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980); Taylor v. Home Ins. Co., 777 F.2d 849 (4th Cir. 1985).

The Fifth Circuit has expressly held that "prohibited employment discrimination in promotion and transfer may often be a continuing violation," and that "[a] persisting and continuing system of discriminatory practices in promotion or transfer produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time." Glass v. Petro-Tex Chemical Corp., 757 F.2d 1554, 1561 (5th Cir. 1985) (internal cites omitted); see also Shepard v. Adams, 670 F. Supp. 22, 25 (D.D.C. 1987).

Other courts of appeal have likewise adopted the concept of "continuing violations". For example, Sosa v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990) held:

> Allegations of conduct occurring prior to the 180-day period[4] are actionable if Sosa can show that they are part of a "continuing violation" of Sosa's Title VII rights. Under the continuing violation doctrine, "a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir.), cert. denied, 459 U.S. 971 [] (1982). We apply the continuing violation doctrine because "the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period." Id. ... Moreover, Sosa may establish a continuing violation "not only by demonstrating ... [an employer]-wide policy or practice, **but also by demonstrating a series of related acts against a single individual**;" that is, against Sosa alone. Green v. Los Angeles Cty. Superintdt. of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989) (emphasis added).

While the conduct against Appellant took place, in part, outside the limitations period, the effect -- the actual discrimination which Title VII and the Rehabilitation Act are

---

[4]Sosa dealt with a private Title VII claim. Such private claims have a 180-day period during which a complaint can be filed with the EEOC. In Federal claims, an informal complaint must be filed with the agency within either 30 or 45 days, 29 C.F.R. § 1614.105, but the legal analysis is identical.

designed to avoid -- lasted well within the period covered by the administrative complaints and in fact was major factor in causing the matters raised in the complaints.

The violations of Dr. Chahil's Rehabilitation Act and Title VII rights within the period covered by his administrative complaints, and the fact that those violations are a part of a pattern, practice and pervasive policy of discrimination reaching back to the first days of his disability, render the whole course of conduct actionable. Sosa, 920 F.2d at 1455. Certainly Dr. Chahil presented enough evidence that the violations were continuous to establish a genuine issue as to the material facts.

As such, this Court should grant certiorari to resolve the differences among the circuits on this important federal issue.

III. Giving an employee with a disability no work to do yet rating him fully satisfactory, admittedly because of his disability, constitutes direct evidence of discrimination actionable under the Rehabilitation Act.

The Courts below found that there was no direct evidence of discrimination against Dr. Chahil, and proceeded to apply the test of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) should be applied. That burden-shifting test is "inapplicable where the Plaintiff presents direct evidence of discrimination." Trans-World Airlines v. Thurston, 469 U.S. 111, 121 (1984). In this case, however, the lower courts misconstrued what constitutes "direct evidence."

While Dr. Chahil's supervisors were well aware of Dr. Chahil's disability, the availability of equipment to accommodate it, and the obligation to provide such accommodations, they failed and refused to do so. Mr. Brucy Gray admitted that he knowingly gave Dr. Chahil no work to do yet rated him "fully satisfactory" because of his disability, thereby precluding Dr. Chahil from being promoted. This direct discrimination was continued by the other supervisors, in whose minds Gray had instilled the idea that Dr. Chahil was "useless" because he was blind.

Direct evidence need not come in the form of discriminatory remarks, as the lower courts seemed to assume. It can even be in the form of facially more favorable treatment. In Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990), the court found that the plaintiff, a black female attorney. Had shown direct evidence that such discrimination motivated her discharge:

> Keller [her department manager] testified that to avoid provoking a discrimination suit he had told Vaughn's supervisors not to confront her about her work. ... Keller also testified that he had deliberately overstated Vaughn's evaluations in order not to start the process that might eventually lead to termination. This direct evidence clearly shows that Keller acted as he did soleiy because Vaughn is black. Texaco has never offered any evidence to show that in neither confronting Vaughn about her poor performance nor counselling her it would have acted as it did without regard to her race. Vaughn has, consequently, established that

Texaco discriminated against her.

918 F.2d at 521-22. The court continued:

> Initially, Texaco's decisions not to criticize Vaughn and not to state her correct evaluations may have appeared beneficial, even -- had she been aware of them -- to Vaughn. She did, for example, receive a merit pay increase in 1986 that she would not have received had Keller given her the evaluation that he believed she deserved. Ultimately, however, whether Texaco's decisions may have damaged Vaughn's employment status at Texaco will never be known. Furthermore, whether Texaco's decisions ultimately benefitted or harmed Vaughn is irrelevant. The decisions not to apply the usual procedures in Vaughn's case were racial decisions. Texaco has never stated any reason other than that she was black for treating Vaughn as it did. Had Texaco treated Vaughn in a color-blind manner from 1985 to 1987, Vaughn might have been fired by April 1987 for unsatisfactory work; on the other hand, she might have sufficiently improved her performance so as not to be one of the two "lowest ranked" employees, thereby avoiding termination in April 1987. Consequently, Texaco must bear the cost of its lost opportunity to determine whether Vaughn might have remained one of the two "lowest ranked" contract analysts had it not made decisions based on race. This circuit will not sterilize a seemingly objective

> decision to fire an employee when earlier discriminatory decisions have infected it.
>
> Because Texaco's behavior was race-motivated, Texaco has violated Title VII. Texaco limited or classified Vaughn in a way which would either "tend to deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee." 42 U.S.C. § 2000e-2(a)(2). Texaco has also "otherwise" discriminated against Vaughn with respect to her "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

Similarly, in assigning Dr. Chahil no work to do yet giving him favorable performance evaluations, and the continuation of this "different" treatment by assigning him to Dr. Basiotis where he had no interaction with the other statisticians and otherwise isolating him, the Secretary denied him the opportunity to improve and to develop and demonstrate the management and supervisory skills that he needed for promotion. The District Court found that, as a result of a lack of such skills, he was ineligible for promotion and supervisory responsibilities -- the "legitimate non-discriminatory reason" given under McDonnell Douglas for the agency's actions. As in Vaughn, the lower courts should have recognized this as direct evidence of discrimination and "not sterilize[d] a seemingly objective decision [] when earlier discriminatory decisions have infected it."

The failure to follow Vaughn creates a split among the circuits on this important issue which this Court should resolve

on certiorari.

IV. The decision below, in holding that accommodation of only one aspect of Dr. Chahil's disability by providing assisted reading equipment satisfies the agency's duty under the Rehabilitation Act to provide reasonable accommodation, despite failing to accommodate other aspects of the disability by requiring him to navigate a stairway to use printers on another floor and by failing to provide a working environment free of smoke and glare, creates a conflict among the circuits on an important issue and decides an important federal question that should be settled by this court.

The courts below held that providing assisted reading equipment to Dr. Chahil satisfied the Secretary's duty to reasonably accommodate his disability, despite the fact that his employer refused to make the printers on his own floor available to him and despite the fact that assigning him a smoky work space that was not glare free aggravated his condition. The panel opinion in this case overlooked the Fourth Circuit's own decision in Johnson v. Shalala, 991 F.2d 126, 132 (4th Cir. 1993), cert. denied 513 U.S. 806 (1994), which held that a partial or incomplete accommodation would fall short of the requirements of the Rehabilitation Act.

> The Rehabilitation Act demands more of the federal government than simple equality of treatment--the government must affirmatively take steps to accommodate employees with handicaps, unless

> accommodation would impose undue hardship on the government. 29 U.S.C. § 791; 29 C.F.R. § 1613.704. Treating disabled workers the same as workers without a disability falls short of satisfying the requirements of the Rehabilitation Act. See Southeastern Community College v. Davis, 442 U.S. 397, 410-11, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979).

Johnson v. Shalala, 991 F.2d 126, 131 (4th. Cir. 1993).

The district court in this case, summarily affirmed by the Court of Appeals, held that the Secretary made reasonable accommodation of Dr. Chahil's disability because it provided him with assisted reading equipment. But that accommodation (late in coming) does not mean that the Government can ignore other aspects of Appellant's disability, such as his sensitivity to smoke and difficulty in navigating stairs due to his blindness. Providing him assisted reading equipment does not make it any more reasonable that Appellant was denied the right to use the printers on his own floor or to have a smoke and glare free office that did not harm his eyes further. The decision of the district court is clearly not in accord with Johnson.

The decision below also conflicts with, and misconstrues, Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988), which held that once readers, assisted reading equipment, and a reduced workload were provided to a visually impaired employee, it was not required that the employer provide further accommodations geared to the same aspect of the disability. But that does not mean that the employer could, by providing only one partial accommodation, avoid its obligation to provide Appellant "with

reasonable accommodation as is necessary to enable him to perform his essential functions." 840 F.2d at 67. Availability of computer-assisted reading equipment does not address the sensitivity of a cornea transplant patient and glaucoma sufferer to smoke and glare. Nor does assisted reading equipment address the sheer physical danger posed by requiring Appellant to climb stairs each time he needed to print a document. These aspects of Appellant's disability must also be reasonably accommodated. The question, as Carter holds, is simply one of reasonableness, and what the Appellee did concerning accommodation of Appellant's disability does not satisfy the requirements of the Rehabilitation Act.

The extent to which an employer must go to accommodate an employee's disability is an important federal question, and it is one on which the lower courts need guidance from this Court. As such, Dr. Chahil asks that this Court grant certiorari on this issue.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant a writ of *certiorari* directed to the U.S. Court of Appeals for the Fourth Circuit to consider the questions presented herein.

Dated: March 23, 1998.

Respectfully submitted,

Daniel M. Press
Counsel of Record for Petitioner
Philip K. Chung
Russell B. Adams, III
CHUNG & PRESS, P.C.
6723 Whittier Ave., Suite 302
McLean, VA 22101
(703) 734-3800

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PARSHOTAM SINGH CHAHIL, Ph.D.,
Plaintiff-Appellant,
v.
SECRETARY OF AGRICULTURE,
United States Department of Agriculture,
Defendant-Appellee.

No. 96-2818

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Catherine C. Blake and Peter J. Messitte, District Judges.
(CA-94-3201-CCB)

Submitted: September 9, 1997

Decided: October 7, 1997

Before HALL, NIEMEYER, and MICHAEL,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Daniel M. Press, Philip Chung, Russell B. Adams III, CHUNG & PRESS, P.C., McLean, Virginia, for Appellant. Lynne A. Battaglia, United States Attorney, Allen F. Loucks, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant Parshotam Singh Chahil appeals from a district court order granting the Defendant's motion for summary judgment and dismissing Chahil's complaint alleging unlawful employment discrimination. Chahil raises six issues on appeal: (1) whether the district court applied the appropriate standard of review in granting summary judgment; (2) whether the district court erred by finding some of his claims time-barred and others as not raised in his administrative complaints; (3) whether he presented evidence showing that he was the victim of adverse employment actions; (4) whether he presented direct evidence of unlawful employment discrimination; (5) whether he presented sufficient evidence to show that the Defendant's reasons for its actions were pretextual; and (6) whether the Defendant provided reasonable accommodation for his disability. Finding no reversible error, we affirm.

Chahil, who has a Ph.D. in statistics, worked for the Human Nutrition Information Service, an agency of the United States Department of Agriculture ("USDA"), from 1984 until 1994, when the agency was disbanded. In 1985, Chahil developed a

severe cornea problem, which required numerous surgeries in both eyes, and glaucoma. These maladies rendered Chahil legally blind and unable to read without using a magnifying device.

In 1992, Chahil filed the first of six formal EEO complaints with the USDA's EEO office alleging that his supervisors were hostile toward him and blocked his advancement; that the agency would not remove the supervisors; that his supervisors "killed" his independent research project; that he was not included in a rotating supervisor program; that he was moved out of his private office and into a smoke-filled secretarial bay; and that he was forced to use printers on another floor. Chahil asserted that these actions were the result of unlawful discrimination based on his disability. The agency investigated Chahil's claims and issued a right to sue letter.

Chahil filed a timely complaint in district court, alleging that every one of his supervisors since 1985 discriminated against him based on his disability, race, national origin, and religion. Chahil also alleged that the Defendant failed to accommodate his disability and that his supervisors retaliated against him for filing formal and informal EEO complaints.* After extensive discovery, the Defendant filed a motion for summary judgment, which the court granted.

After considering the parties' briefs and joint appendix, we affirm for the reasons stated in the district court's thorough opinion. *See Chahil v. Secretary of Agric.*, No. CA-94-3201-CCB (D. Md. Oct. 17, 1996). We reject Chahil's assertion that the district court made an improper credibility determination in granting summary judgment. After the Defendant gave a legitimate, non-

*Chahil does not appeal the district court's grant of summary judgment on the retaliation claims.

discriminatory reason for its actions, Chahil bore the burden of showing that the reason was a pretext for illegal discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The district court properly found that Chahil's personal speculations standing alone were insufficient to satisfy this burden. See *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PARSHOTAM SINGH CHAHIL

V. Civil Action No. CCB-94-3201

SECRETARY OF AGRICULTURE,
UNITED STATES DEPARTMENT
OF AGRICULTURE

MEMORANDUM OPINION

Plaintiff Parshotam Singh Chahil, Ph. D., has sued his employer, the Secretary of Agriculture, alleging twelve claims under three different statutes: Title VII, § 1981, and the Rehabilitation Act of 1973. Eight of these claims involve discriminatory treatment on the basis of race, national origin, religion, or low-vision disability. Two additional claims relate to the Secretary's alleged failure to accommodate Dr. Chahil's disability, and his final two claims assert that the Secretary retaliated against him following his formal and informal complaints of discrimination. The Secretary disputes these claims, and has filed a motion for summary judgment. No hearing is deemed necessary. See Local Rule 105.6. For the reasons set forth below, the motion will be granted.

BACKGROUND

Dr. Chahil is a naturalized citizen from India who practices the Sikh religion, which includes wearing a full beard and turban. In 1984 the Human Nutrition Information Service, an agency of the Department of Agriculture, hired Dr. Chahil to work as a statistician with a GS-11/13 career ladder. During his

years with the department, Dr. Chahil was never given more than within scale pay raises.

Shortly after coming to work for the Department of Agriculture, Dr. Chahil began to experience vision difficulties. He now suffers from a low vision disability. The Department provided Dr. Chahil with some specialized equipment to accommodate his vision difficulties.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court clarified that this does not mean that any factual dispute will defeat the motion:

> By its very terms, this standard provides that the mere existence of <u>some</u> alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no <u>genuine</u> issue of <u>material</u> fact.

<u>Anderson v. Liberty Lobby, Inc.</u>, 477 U.S. 242, 247-48 (1986) (emphasis in original).

Moreover, the Supreme Court has explained that the

Rule 56(c) standard mirrors the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 (a). The Court has stated that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249; see also Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 115 S. Ct. 67 & .68 (1994) ; Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992), cert. denied, 113 S. Ct. 1415 (1993). "The party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 (4th Cir. 1988). The court must "view the facts and draw reasonable inferences in a light most favorable to the nonmoving party," Shaw, 13 F. 3d at 798, but it also must abide by its affirmative obligation to ensure that factually unsupported claims and defenses do not proceed to trial. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)) . " [A] defendant . . . should not be required to undergo the considerable expense of preparing for and participating in a trial" unless the plaintiff has produced "evidence on which a jury might rely" in support of the claims alleged. E.F. Hutton Mortgage Corp. v. Equitable Bank, N.A., 678 F. Supp. 567, 573 (D. Md. 1988).

I. Discrimination Claims

Dr. Chahil's complaint includes eight counts of discriminatory treatment related to his race, national origin, religion, and disability. During the course of pleading his case Dr. Chahil refers to only one piece of direct evidence, a statement made by Brucy Gray sometime in the 1980's regarding

Dr. Chahil's ability to see the screen due to his disability. Plaintiff's Opposition at 42-45.[1] This statement will not be considered relevant evidence because it was made four years before Dr. Chahil filed his first formal complaint with the EEOC and was not relied on in any of his EEOC complaints.[2] See Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511-12 (4th Cir.) ,cert. denied, 115 S. Ct. 666 (1994) . Furthermore, the statement was made only once, id., and was not made by or in the presence of persons alleged to have discriminated against Dr. Chahil as recounted in the EEOC complaints. See Douglas v. PHH FleetAmerica Corp., 832 F. Supp. 1002, 1010 (D. Md. 1993).

In the absence of direct proof, the McDonnell-Douglas test is appropriate for eight of Dr. Chahil's twelve claims. The same test can be used under all three statutes. Ennis v. National Ass'n of Business and Educational Radio, Inc., 53 F.3d 55, 57-58 (4th Cir. 1995) (referring to Title VII and the Rehabilitation Act); Williams v. Cerberonics, Inc., 871 F.2d 452, 460 (4th Cir. 1989) (referring to § 1981 and Title VII). For purposes of considering the Title VII, § 1981, and Rehabilitation claims the court will assume without deciding that Mr. Chahil presented a

---

[1]The Secretary also refers to a comment made by Mr. Rust in late April or early May of 1992: "Well, you're having all this problem with Harris. Have you thought about just moving to India, leaving, you know?" Plaintiff's Deposition June 28, 1995 at 72-73 (Defendant's Exhibit 1C). In his opposition to defendant's motion for summary judgment Dr. Chahil does not rely on this evidence. Even if this statement was considered, it is not enough to show discrimination on the basis of national origin where the statement was made only once and is unsupported by other evidence. Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 512 (4th Cir.), cert. denied, 115 S. Ct. 666 (1994).

[2]Many of Dr. Chahil's complaints in this lawsuit were never presented to the EEOC and are barred as untimely or for lack of administrative exhaustion.

prima facie case of discrimination on the basis of race, national origin, religion, and disability. This raises an inference of discrimination and shifts the burden of production to the Secretary to articulate a legitimate, non-discriminatory reason for the actions alleged. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The Secretary claims that all of the actions taken against Dr. Chahil related to his lack of prerequisite abilities and technical capacity as well as his poor leadership skills and failure to publish articles. This articulation of non-discriminatory reasons is well documented in defendant's records. See Defendant's Memorandum in support of Summary Judgment at 33-39. The burden of production accordingly shifts back to Dr. Chahil to show that the reasons were merely pretextual. McDonnell Douglas, 411 U.S. at 804.

Plaintiff bears the burden of showing that defendant intentionally discriminated against him on the basis of his race, national origin, religion, and disability. Lucas v. Dole, 835 F.2d 532, 533 (4th Cir. 1987). The key to this showing is that the plaintiff must demonstrate that "discrimination was the real reason" for the challenged actions. Theard v. Galxco, Inc., 47 F.3d 676, 680 (4th Cir. 1995), quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993). The plaintiff must do more than assert his belief that he was discriminated against in order to show he has been the victim of intentional discrimination. Evans v. Technologies Applications & Service Co., 80 F.3d 954, 960 (4th Cir. 1996); Robinson v. Montgomery Ward and Co., Inc., 823 F.2d 793, 796 (4th Cir. 1987), cert. denied, 484 U.S. 1042 (1988). Dr. Chahil must show "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," that

the legitimate, nondiscriminatory explanation offered by the Secretary is pretextual. Long v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 882 F. Supp. 1553, 1564 (D. Md. 1995), quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). See also Abasiekong v. City of Shelby, 744 F.2d 1055, 1058 (4th Cir. 1984).

In this case Dr. Chahil has failed to present evidence, direct or circumstantial, to support the idea that his negative experiences were based on his race, religion, national origin, or low-vision disability,[3] or that discrimination was more likely the reason for the experiences. Long, 882 F. Supp. at 1564. Dr. Chahil also has not shown that the Secretary's explanation is unworthy of credence or that "but for" the discrimination, he would not have suffered his alleged harms. Douglas, 832 F. Supp. at 1010. Dr. Chahil could have called multiple witnesses to attest to the alleged discriminatory acts, but did not. See, e.g., Defendant's Exhibits 52 and 55. Instead, Dr. Chahil relies on his own speculation and assertion to establish that the explanation is pretextual and that the defendant acted with discriminatory intent.[4] At the summary judgment stage of the proceeding, this lack of evidence is fatal. The Secretary's legitimate explanation, by contrast, are well-supported and persuasive. Because Dr. Chahil failed to offer proof that creates a genuine issue of material fact, the Secretary's motion for

---

[3]Many of the negative experiences alleged by Dr. Chahil are insufficient to constitute adverse employment actions remediable by the anti-discrimination statutes he relies on. See Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981), cert. denied, 454 U.S. 92 (1982).

[4]To the extent any other admissible evidence was presented, it also was insufficient to establish discriminatory intent. See Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987), cert. denied, 483 U.S. 1006 (1987).

summary judgment on counts one through eight will be granted.

II. Reasonable Accommodation Claims

Counts nine and ten of the complaint require some consideration of what constitutes a reasonable accommodation under the Rehabilitation Act of 1973. 29 U.S.C. § 701 et seq. Where an employee could do the job if provided "reasonable accommodation," the employer is required to provide such accommodation. 29 C.F.R. § 1614.203(c)(1); Johnson v. Sullivan, 764 F. Supp. 1053, 1065 (D. Md. 1991). Accommodations that impose "undue financial and administrative burdens" are not considered reasonable. Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979) . "[O]nce the employer puts forth credible evidence of reasonable accommodation or inability to accommodate, plaintiff has the burden of providing evidence regarding possible accommodation to rebut the employer's evidence." Johnson, 764 F. Supp. at 1065 (citations omitted).

In Carter v. Bennett the court was faced with a similar situation where defendant provided some accommodation for plaintiff's blindness. 651 F. Supp. 1299 (D. D.C. 1987), aff'd, 840 F.2d 63 (1980) . Plaintiff, a federal employee, subsequently complained under the Rehabilitation Act that he was not reasonably accommodated. He argued that in addition to some accommodations already in place, the government should provide him with "a full time reader of his choice, more technically advanced equipment, and easier access to additional work space." Id. at 1301. The court found that the plaintiff was not entitled to relief and explained that "[t]he government is not obligated under the statute to provide plaintiff with every accommodation he may request, but only with reasonable accommodation as is necessary to enable him to perform his

essential functions." Id.

With respect to Dr. Chahil's two complaints before the EEOC[5] for failure to reasonably accommodate, Dr. Chahil complains that the Secretary failed to accommodate him when on January 27, 1993 he was relocated to work in a smoke-filled environment without space for his low-vision equipment. Plaintiff's Complaint at ¶ 79. He was moved to a smoke-free room on February 5, 1993 and to a better space in April 1993 but then beginning in July 1993 was forced to use printers on the floor below his office. See Defendant's Motion for Summary Judgment Exhibits IC at 18, 28, 52, 87-89; Exhibit 6 at 13-16; Exhibit 38.

The Department has provided undisputed evidence that it reasonably accommodated Dr. Chahil's low-vision disability. Specifically, the Secretary provided a student assistant, expensive computer equipment at Dr. Chahil's request, time to obtain and learn how to use that equipment, and a private office. Plaintiff's Deposition on June 26, 1995 at 62-64, 155-57; Defendant's Motion for Summary Judgment Exhibits 2, 6 at 15.

Dr. Chahil has not shown the court any convincing evidence that his additional accommodations were necessary. Dr. Chahil has not provided medical evidence of a problem caused by the changes in his workplace. In addition, he has not shown the court that he could not do his job and thereby suffered adverse action. Because Dr. Chahil has not

---

[5]Dr. Chahil alleges various failures to accommodate. This opinion limits its consideration to the two incidents which were alleged in EEOC complaints and made subjects of counts nine and ten of Dr. Chahil's complaint filed in this court. See Defendant's Motion for Summary Judgment Exhibit 53, 55; Plaintiff's Complaint ¶¶ 79, 83.

demonstrated that these accommodations were necessary for adequate performance of his job there is no genuine issue to preclude summary judgment. Accordingly, the Secretary's motion for summary judgment on counts nine and ten will be granted.

III. Retaliation Claims

In order to prevail on a retaliation claim a plaintiff must first establish a prima facie case by showing that: (1) he engaged in a protected activity; (2) the defendant took adverse employment action against him; and (3) there is a causal nexus between the adverse action and the protected activity. Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994). If the employer rebuts the inference raised by the prima facie case with a non-retaliatory explanation for his actions, the plaintiff bears the burden of showing that the defendant's reasons are pretextual. Id.

Assuming *arguendo* that Dr. Chahil established a prima facie case, the Secretary is still entitled to summary judgment on these claims. As was the case with the discrimination claims, the Secretary had substantial reasons for its actions and Dr. Chahil has not shown those reasons to be pretextual. Therefore, defendant's motion for summary judgment on counts eleven and twelve will be granted.

A separate Order follows.

Oct. 15, 1996
Date

/s/
Catherine C. Blake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PARSHOTAM SINGH CHAHIL

V. Civil Action No. CCB-94-3201

SECRETARY OF AGRICULTURE,
UNITED STATES DEPARTMENT
OF AGRICULTURE

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

1. defendant's motion for summary judgment is **GRANTED; and**

2. copies of this Order and the accompanying Memorandum Opinion shall be mailed to counsel of record.

Oct. 15, 1996
Date

/s/
Catherine C. Blake
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 22, 1997

No. 96-2818
CA-94-3201-CCB

PARSHOTAM SINGH CHAHIL, Ph.D.
Plaintiff - Appellant

v.

SECRETARY OF AGRICULTURE,
United States Department of Agriculture
Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

STATUTORY AND REGULATORY PROVISIONS

Rehabilitation Act of 1973, as amended

29 U.S.C. § 791. Employment of individuals with disabilities

(b) Federal agencies; affirmative action program plans. Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

(g) Standards used in determining violation of section
The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Civil Rights Act of 1991

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights In an action brought by a complaining party

under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort In cases where a discriminatory practice involves the provision of

a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(c) Jury trial If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

Title VII of the Civil Rights Act of 1964, as amended

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are

paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Code of Federal Regulations

29 C.F.R. § 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term discrimination includes, but is not limited to, the acts described in Secs. 1630.5 through 1630.13 of this part.

29 C.F.R. § 1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability.

29 C.F.R. § 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.